

FILED
Court of Appeals
Division II
State of Washington
6/22/2020 10:47 AM

No. 54288-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Miller,

Appellant.

Pierce County Superior Court Cause No. 18-1-03704-4

The Honorable Judge Jerry T. Costello

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT..... 1

I. The court’s instructions misstated the law of self-defense..... 1

A. The trial court concluded that Mr. Miller was entitled to instructions on self-defense, but gave the instructions applicable to homicide cases..... 1

B. The record supports the trial court’s decision to instruct on self-defense. 2

C. Mr. Miller did not use deadly force. 10

II. The trial court denied Mr. Miller his right to instructions on a lesser-included offense..... 13

A. Unlawful display of a weapon is a lesser included offense of first-degree assault under *Workman’s* legal prong. 13

B. Unlawful display of a weapon is a lesser included offense of first-degree assault under *Workman’s* factual prong. 15

C. Mr. Miller was not “in” his place of abode, and thus could have been prosecuted for unlawful display of a weapon. 18

III. The trial judge violated Mr. Miller’s due process right to instructions on a lesser-included offense. 20

IV. The trial court violated Mr. Miller’s right to counsel by failing to adequately inquire into his conflict with his attorney. 20

CONCLUSION 20

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

| | |
|--|---------|
| <i>City of Seattle v. Levesque</i> , --- Wn.App.2d ---, 460 P.3d 205 (2020)..... | 9 |
| <i>In re Crace</i> , 157 Wn.App. 81, 236 P.3d 914 (2010), <i>rev'd on other grounds</i> , 174 Wn.2d 835, 280 P.3d 1102 (2012)..... | 14 |
| <i>State v. Baggett</i> , 103 Wn.App. 564, 13 P.3d 659 (2000)..... | 14 |
| <i>State v. Berlin</i> , 133 Wn.2d 541, 947 P.2d 700 (1997) | 15 |
| <i>State v. Brigham</i> , 52 Wn.App. 208, 758 P.2d 559 (1988) | 9 |
| <i>State v. Callahan</i> , 87 Wn.App. 925, 943 P.2d 676 (1997) | 3, 7 |
| <i>State v. Condon</i> , 182 Wn.2d 307, 343 P.3d 357 (2015) | 16, 17 |
| <i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000) | 3, 16 |
| <i>State v. Fisher</i> , 185 Wn.2d 836, 374 P.3d 1185 (2016)..... | 3, 4, 8 |
| <i>State v. Franklin</i> , 180 Wn.2d 371, 325 P.3d 159 (2014) | 2 |
| <i>State v. Gamble</i> , 168 Wn.2d 161, 225 P.3d 973 (2010) | 17 |
| <i>State v. George</i> , 161 Wn.App. 86, 249 P.3d 202 (2011) | 4 |
| <i>State v. Griffith</i> , 91 Wn.2d 572, 589 P.2d 799 (1979) | 9, 10 |
| <i>State v. Haley</i> , 35 Wn.App. 96, 665 P.2d 1375 (1983)..... | 19 |
| <i>State v. Jackson</i> , 137 Wn.2d 712, 976 P.2d 1229 (1999) | 13 |
| <i>State v. Janes</i> , 121 Wn.2d 220, 850 P.2d 495 (1993)..... | 4 |
| <i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010)..... | 2 |
| <i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009) | 3, 10 |
| <i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983) | 3 |

| | |
|---|---------------------------|
| <i>State v. Parker</i> , 102 Wn.2d 161, 683 P.2d 189 (1984)..... | 13, 16, 17, 19 |
| <i>State v. Prado</i> , 144 Wn.App. 227, 181 P.3d 901 (2008) | 14 |
| <i>State v. Rodriguez</i> , 121 Wn.App. 180, 87 P.3d 1201 (2004)..... | 4 |
| <i>State v. Staley</i> , 123 Wn.2d 794, 872 P.2d 502 (1994) | 3 |
| <i>State v. Walden</i> , 131 Wn.2d 469, 932 P.2d 1237 (1997)..... | 12 |
| <i>State v. Werner</i> , 170 Wn.2d 333, 241 P.3d 410 (2010) | 3, 4, 7, 8, 10 |
| <i>State v. Woods</i> , 138 Wn.App. 191, 156 P.3d 309 (2007) | 4 |
| <i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978).. | 13, 14, 15, 16, 17, 18 |

CONSTITUTIONAL PROVISIONS

| | |
|-------------------------------|---|
| U.S. Const. Amend. VI..... | 2 |
| U.S. Const. Amend. XIV | 2 |
| Wash. Const. art. I, §22..... | 2 |
| Wash. Const. art. I, §3..... | 2 |

WASHINGTON STATE STATUTES

| | |
|--------------------|-------------------|
| RCW 9.41.270 | 14, 16, 18, 19 |
| RCW 9A.16.020..... | 1, 10, 11, 12, 13 |
| RCW 9A.16.050..... | 1, 10, 12, 13 |

OTHER AUTHORITIES

| | |
|--|----|
| 1 Wayne R. LaFave & Austin W. Scott, Jr., <i>Substantive Criminal Law</i> (1986)..... | 12 |
| 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.02 (4th Ed) | 1 |

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (4th Ed) 1, 9, 11

ARGUMENT

I. THE COURT’S INSTRUCTIONS MISSTATED THE LAW OF SELF-DEFENSE.

- A. The trial court concluded that Mr. Miller was entitled to instructions on self-defense but gave the instructions applicable to homicide cases.

Mr. Miller was entitled to use force if he reasonably believed he was “about to be injured.” RCW 9A.16.020(3); *see also* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (4th Ed). The court erroneously instructed jurors that Mr. Miller could not use force in self-defense unless he feared “great personal injury.” CP 52, 55, 56.

This second standard is the one applicable in homicide cases, though Mr. Miller was not charged with homicide. RCW 9A.16.050(1); *See also* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.02 (4th Ed); CP 1. The court should have instructed using the “about to be injured” language. For the first time on review, Respondent claims that Mr. Miller was not entitled to instructions on self-defense. Brief of Respondent, p. 14-16. In the lower court, the State took no exception to the court’s decision to instruct on self-defense.¹ RP (10/21/19) 771-787.

Instead, the prosecutor proposed jury instructions at trial pertaining

¹ At the start of trial, the State claimed lack of noticed as to the defense. RP (10/9/19) 8-12. However, the prosecutor did not seek a continuance and did not renew this complaint during the instructions conference. RP (10/9/19) 8-12; RP (10/21/19) 772-787.

to self-defense.² RP (10/21/20) 772, 774, 778-784. These included an aggressor instruction and instructions containing the language at issue here. RP (10/21/20) 774, 780. The court accepted the prosecutor's proposals.³ CP 52, 55, 56, 58. Under these circumstances, the State waived the claim it now seeks to assert.

The Court of Appeals should not entertain Respondent's argument. Furthermore, the facts, when taken in a light most favorable to Mr. Miller, provided at least some evidence of self-defense.

B. The record supports the trial court's decision to instruct on self-defense.

Mr. Miller had reason to believe he needed to act in self-defense: a larger, often armed, man confronted him on his porch, did not leave when asked, tackled the frail Mr. Miller and took him to the ground, refused to let Mr. Miller up, and injured Mr. Miller. RP (10/15/19) 204, 268-269, 292-294; RP (10/16/19) 390-391, 413; RP (10/17/19) 557, 562, 701, 716-725.

An accused person has a constitutional right to present his defense to the jury. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§3, 22;

² The prosecutor apparently did not file supplemental proposed instructions, but instead presented them to the court during the instructions conference.

³ The court did reject part of one instruction proposed by the State: "I am not going to give this entire instruction that [the prosecutor] just handed forward..."RP (10/21/19) 779-784.

State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014). This includes a right to appropriate instructions on the defense theory.⁴ *State v. Fisher*, 185 Wn.2d 836, 848, 374 P.3d 1185 (2016).

Where there is “some evidence” of self-defense, a trial judge must instruct jurors on the defense. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). Here, Mr. Miller was entitled to self-defense instructions because there was “some evidence” supporting the defense. *Id.*

The evidence must be viewed in the light most favorable to Mr. Miller. *Fisher*, 185 Wn.2d at 848-49. The evidence supporting his defense “may come from ‘whatever source.’” *Id.* (quoting *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)).

In assessing a request for instructions on self-defense, courts “must consider all of the evidence that [was] presented at trial.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The court must give “particular attention to those events immediately preceding” the alleged assault. *State v. Callahan*, 87 Wn.App. 925, 933, 943 P.2d 676 (1997).

Self-defense “requires only a subjective, reasonable belief of

⁴ Furthermore, every litigant is entitled to jury instructions that accurately state the law and permit him to argue his theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

imminent harm from the victim.” *State v. Kyлло*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). The evidence need not show “an actual physical assault.” *State v. Janes*, 121 Wn.2d 220, 241, 850 P.2d 495 (1993). Nor need there be proof of “*actual* imminent harm.” *State v. Woods*, 138 Wn.App. 191, 199, 156 P.3d 309 (2007) (emphasis in original).

Instead, the court must consider the “contextual circumstances.” *State v. George*, 161 Wn.App. 86, 99, 249 P.3d 202 (2011). In other words, self-defense requires jurors to “put themselves in the defendant’s shoes.” *State v. Rodriguez*, 121 Wn.App. 180, 185, 87 P.3d 1201 (2004).

An imminent threat “is not necessarily an immediate threat but instead acknowledges the circumstance of ‘hanging threateningly over one’s head; menacingly near.’” *George*, 161 Wn.App. at 99 (quoting *Janes*, 121 Wash.2d at 241 (citation omitted)). Furthermore, “[a] threat, *or its equivalent*, can support self-defense.” *Janes*, 121 Wn.2d at 241 (emphasis added).

When taken in a light most favorable to Mr. Miller, the facts show at least “some evidence” of self-defense. *Werner*, 170 Wn.2d at 337; *Fisher*, 185 Wn.2d at 848-49. The “contextual circumstances” establish a danger that was “‘hanging threateningly over [Mr. Miller’s] head; menacingly near.’” *George*, 161 Wn.App. at 99 (quoting *Janes*, 121 Wash.2d at 241) (internal quotation marks and citation omitted).

Aitchison is over six feet tall and weighed 360 pounds. RP (10/15/19) 293; RP (10/16/19) 391, 413. Mr. Miller is frail. He broke his back in 1993, and his mobility remains limited. RP (10/15/19) 226; RP (10/17/19) 677-680, 709.

Mr. Miller knew that Aitchison often carried a gun. RP (10/17/19) 701. He had been told that Frye was a felon, recently released from prison. RP (10/17/19) 706.

When Aitchison and Frye drove to Mr. Miller's trailer, both got out of Aitchison's truck. RP (10/15/19) 200-201, 205, 268, 288. Aitchison mounted Mr. Miller's porch and pounded on the door. RP (10/15/19) 268, 269, 292, 300; RP (10/17/19) 712-713. Frye stood at the bottom of Mr. Miller's steps. RP (10/17/19) 713.

Mr. Miller felt threatened and told Aitchison to get off his porch. RP (10/15/19) 292, 295; RP (10/16/19) 390-391; RP (10/17/19) 716-719, 747. Aitchison refused. RP (10/17/19) 719.

According to Mr. Miller, Aitchison tackled him without provocation. RP (10/17/19) 719-720. One witness said Aitchison "hip checked" Mr. Miller and took him to the ground. RP (10/15/19) 293-294. Aitchison was on top of Mr. Miller, who fell through the porch. RP (10/15/19) 203, 293-295, 331, 338; RP (10/16/19) 391; RP (10/17/19) 719-720, 747. Aitchison initially refused to let Mr. Miller get up. RP (10/15/19) 204.

Aitchison's hands were at Mr. Miller's upper chest. RP (10/15/19) 294.

To Mr. Miller's neighbor (Jourdan Brown), it looked like Aitchison was choking Mr. Miller. RP (10/15/19) 218, 228. Brown was concerned for Mr. Miller's safety, and thought Mr. Miller was no match for Aitchison. RP (10/15/19) 204, 229, 259, 260, 338. Aitchison injured Mr. Miller's shoulder, and he was in pain. RP (10/17/19) 557, 562, 720-725, 748.

Neither Aitchison nor Frye left after Aitchison released Mr. Miller. RP (10/15/19) 231; RP (10/17/19) 721-725. Mr. Miller was afraid. RP (10/17/19) 726.

When he heard the truck door open, he feared that Aitchison had gone to get his gun. RP (10/17/19) 722. Mr. Miller fetched his own pistol and fired several shots in the air,⁵ attempting to "run them off." RP (10/17/19) 726. He was not trying to shoot them. RP (10/17/19) 726.

He testified that he "wanted them off—out of there." RP (10/17/19) 726. They "were scaring the crap out of [him]... [they'd] already messed up [his] arm." RP (10/17/19) 726. Even after he fired his gun, "they wouldn't leave." RP (10/17/19) 726-727.

Mr. Miller thought the first round "would scare them off and they

⁵ Although he planned to fire all shots in the air, he had difficulty lifting his arm because of injuries inflicted by Aitchison, and the first shot hit Aitchison's truck. RP (10/10/19) 153; RP (10/16/19) 339; RP (10/17/19) 575-579; RP (10/17/19) 725-727.

would get the hell out of there.” RP (10/17/19) 727. When they didn’t leave, he fired in the air twice more.⁶ RP (10/17/19) 726. He was “concerned about them coming back,” and “wanted to make sure that they were completely out of the area.” RP (10/17/19) 727.

This reading of the testimony provides at least “some evidence” of self-defense. *Werner*, 170 Wn.2d at 337. The “events immediately preceding”⁷ the alleged assault support the court’s decision to instruct on the defense theory.

Mr. Miller had been assaulted without provocation by a younger, larger man while a second man stood at the bottom of his steps. He had been pushed through the floor of his porch and choked, and Aitchison refused to let him up at first. Mr. Miller believed Aitchison had returned to his truck to get a gun. He intended to fire in the air to scare off the two men and did not intend to shoot either of them.

Respondent erroneously contends that Mr. Miller “had no right to any self-defense instruction [because] his assault on his neighbors was unjustifiable as a matter of law.” Brief of Respondent, p. 14. Respondent’s argument is based on a flawed understanding of the applicable standard.⁸

⁶ Although he didn’t realize it at the time, the gun also misfired once. RP (10/17/19) 605, 726.

⁷ *Callahan*, 87 Wn.App. at 933.

⁸ Respondent’s argument also shows a misunderstanding of the phrase “deadly force,” as argued elsewhere in this brief.

The trial court properly viewed the evidence in a light most favorable to Mr. Miller. *See Fisher*, 185 Wn.2d at 848-49. Instead of summarizing the facts in a light most favorable to Mr. Miller, Respondent provides an alternate version supporting a finding of guilt. Brief of Respondent, p. 15.

Under the proper standard, the facts justify the court's decision to instruct on self-defense. As noted, Mr. Miller was assaulted without provocation, and he feared Aitchison had returned to his truck to get his gun. He retrieved his own pistol because he was afraid. He did not intend to shoot Aitchison or Frye; instead, he fired because he was afraid, and he wanted to make them leave.⁹

Respondent does not mention Aitchison's initial assault on Mr. Miller, or the injuries the older man suffered. Brief of Respondent, p. 15. Respondent also fails to address Mr. Miller's fear that Aitchison had gone to fetch his gun. Brief of Respondent, p. 15.

Respondent implies that Mr. Miller was not entitled to use self-defense if he was angry as well as afraid. Brief of Respondent, p. 11, 15. Respondent cites no authority in support of this position. Where no authority

⁹ According to Respondent, "shot *at* specific persons," and nearly hit Aitchison. Brief of Respondent, p. 15. But the evidence must be taken in a light most favorable to Mr. Miller, who testified that the direction of the first bullet was a result of accident rather than intent. RP (10/17/19) 725-726. This is akin to cases where a person accidentally shoots someone while displaying a weapon in self-defense. *See, e.g., Werner*, 170 Wn.2d at 337.

is cited, this court should presume counsel found none after diligent search. *See City of Seattle v. Levesque*, --- Wn.App.2d ---, ___, 460 P.3d 205 (2020).

Actions that qualify as self-defense require acquittal. Mr. Miller was entitled to use force to defend himself if he reasonably feared injury, even if he also felt angry. There is no mixed-motive exception to the right to use self-defense. *See RCW 9A.16.020; WPIC 17.02.*

Respondent also suggests that Mr. Miller's actions were "unquestionably excessive" as a matter of law. Brief of Respondent, p. 16 (citing *State v. Brigham*, 52 Wn.App. 208, 758 P.2d 559 (1988) and *State v. Griffith*, 91 Wn.2d 572, 589 P.2d 799 (1979)). Neither case provides an appropriate analogy.

In *Brigham*, the defendant killed an unarmed man by repeatedly stabbing him in the back during an altercation. *Brigham*, 52 Wn.App. at 208. Mr. Miller did not cause any physical harm, much less kill anyone.¹⁰ Had he intentionally killed Aitchison, his use of force would have been excessive. He did not; instead, he sought to fire in the air because he was afraid and wished Aitchison and Frye to leave.

In *Griffith*, the defendant shot and killed an unarmed man who

¹⁰ In addition, he believed that Aitchison had returned to his truck to get his gun. RP (10/17/19) 722.

“had not engaged in any aggressive behavior.” *Griffith*, 91 Wn.2d at 576. Here, by contrast, “some evidence”¹¹ showed that Aitchison had committed an unprovoked attack, choking and injuring Mr. Miller, and that Mr. Miller feared Aitchison would return to his trailer with a gun. He did not cause any physical harm or kill anyone.

Whether Mr. Miller’s actions qualified as self-defense was a jury question. The trial court found the facts sufficient to warrant instructions on the defense theory. CP 52. As noted, the State did not object; instead, the prosecutor proposed instructions pertaining to Mr. Miller’s self-defense claim. RP (10/21/20) 774, 780. Under these circumstances, the jury should have received instructions that made the proper standard “manifestly apparent to the average juror.” *Kyllo*, 166 Wn.2d at 864 (internal quotation marks and citations omitted).

Taking all the facts in a light most favorable to Mr. Miller, at least “some evidence” supported the defense. *Werner*, 170 Wn.2d at 337. The Court of Appeals should reject Respondent’s argument and reverse. *Id.*

C. Mr. Miller did not use deadly force.

Respondent erroneously argues that the “great personal injury” standard applies in Mr. Miller’s case because he responded to Aitchison

¹¹ *Werner*, 170 Wn.2d at 337.

“with deadly force.” Brief of Respondent, p. 18. This is incorrect for several reasons.

First, the statutes governing self-defense are clear. A person may lawfully use force when he is “about to be injured.” RCW 9A.16.020(3). The “great personal injury” standard applies only to justifiable homicide. RCW 9A.16.050(1).

Mr. Miller did not commit homicide. He was entitled to use force if he believed he was about to be injured. RCW 9A.16.020(3). The reasonableness of his belief and the proportionality of his response were matters for the jury. *See* WPIC 17.02.

Second, Mr. Miller’s intent was to fire in the air, and none of his shots hit anyone.¹² He therefore did not use deadly force, which is defined to mean “the *intentional application of force* through the use of firearms...” RCW 9A.16.010 (emphasis added). Mr. Miller did not use deadly force—he did not *intend* to shoot anyone, and he did not *apply force* to anyone.

Furthermore, under the statute, the use of “deadly force” is only at issue when a police officer uses such force. RCW 9A.16.040. The law regarding use of deadly force does not apply in Mr. Miller’s case.

¹² As noted, his first shot nearly hit Aitchison despite his intent to fire in the air; this was because the shoulder injury inflicted by Aitchison interfered with Mr. Miller’s ability to raise his arm. RP (10/17/19) 725-726, 755-756.

Respondent relies on *Walden* to argue that the “great personal injury” standard applies to Mr. Miller. Brief of Respondent, p. 18-19 (citing *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997)). Respondent here points out that the Supreme Court endorsed the “great personal injury” standard even though the defendant in that case did not inflict any injury. Brief of Respondent, p. 18.

The *Walden* court did not decide the issue, and the case does not stand for the argument made by Respondent. The court did not determine the proper standard for a threatened (as opposed to actual) use of deadly force:

The parties in this case have limited their arguments to the reasonable *use* of deadly force in self-defense, as opposed to a *threat to use* deadly force... Because the parties have not raised this issue in their briefs or at oral argument, we do not address it.

Walden, 131 Wn.2d at 474 n. 2 (emphasis in original). As the court pointed out, “merely to threaten death or serious bodily harm, without any intention to carry out the threat, is not to use deadly force...” *Id.* (quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7(a) at 651 (1986)). Even if Mr. Miller threatened death or serious bodily harm, he had no “intention to carry out the threat.”¹³ *Id.*

¹³ LaFave goes on to say that “one may be justified in pointing a gun at his attacker when he would not be justified in pulling the trigger.” LaFave, § 5.7(a) at 651. Although Mr. Miller did “pull[] the trigger” of his gun, he did not do so while intentionally pointing it at

Finally, Respondent argues that Mr. Miller’s position is “contrary to public policy.” Brief of Respondent, p. 19. Given the clear standards set forth in RCW 9A.16.020 and RCW 9A.16.050(1), any policy argument should be addressed to the legislature. *See State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999).

Because Mr. Miller did not commit a homicide, his case is governed by RCW 9A.16.020(3). He was entitled to use force if he reasonably believed he was “about to be injured” RCW 9A.16.020(3) and in this case he had already been injured and feared for his life. The trial court should not have instructed jurors on the “great personal injury” standard applicable in homicide cases. RCW 9A.16.050(1).

II. THE TRIAL COURT DENIED MR. MILLER HIS RIGHT TO INSTRUCTIONS ON A LESSER-INCLUDED OFFENSE.

A. Unlawful display of a weapon is a lesser included offense of first-degree assault under *Workman*’s legal prong.

An accused person has an “unqualified” right to instructions on an applicable lesser-included offense. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984); *see also State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). Here, the trial court found that “that the legal and factual prongs of *Workman* are satisfied by the evidence in this case.” RP

Aitchison and Frye. Instead, as noted, he planned to fire in the air, but pulled the trigger prematurely while attempting to raise his injured arm.

(10/21/19) 775; CP 23-26.

Respondent erroneously suggests that the legal prong is not satisfied. Brief of Respondent, p. 21. According to Respondent, “[i]t is possible to commit an assault in the first degree, as charged, without committing a [sic] unlawful display of a firearm.” Brief of Respondent, p. 21. This is incorrect.

The legal prong is satisfied as a matter of law. Numerous courts have concluded that unlawful display qualifies as a lesser included offense of an armed assault. *See State v. Baggett*, 103 Wn.App. 564, 569, 13 P.3d 659 (2000). This is so because “[a]ll of the elements of RCW 9A.02.020(1) are necessary elements of [assault with a deadly weapon].” *Id.* Thus “[a] person who displays a firearm in the manner described [in the statute], also commits some, but not all, of the acts necessary for commission of [assault with a deadly weapon].”¹⁴ *Id.*

Respondent’s flawed argument rests on the premise that “[a] person can commit an assault under the charged prong without any witness ever seeing the firearm.” Brief of Respondent, p. 21. This is irrelevant for

¹⁴ *See also State v. Prado*, 144 Wn.App. 227, 243, 181 P.3d 901 (2008); *In re Crace*, 157 Wn.App. 81, 107–08, 236 P.3d 914, 930 (2010), *rev’d on other grounds*, 174 Wn.2d 835, 280 P.3d 1102 (2012) (“Because all the elements of unlawful display of a weapon are also necessary elements of second degree assault, unlawful display of a weapon is a lesser included offense of second degree assault, satisfying the legal prong of the *Workman* test.”) Although these cases address second-degree assault, the legal analysis applies equally to the crime charged here.

two reasons.

First, the lesser charge can be committed when a person “draw[s] any firearm... in a manner... that warrants alarm for the safety of other persons.” RCW 9.41.270(1). Contrary to Respondent’s argument, the lesser crime can be committed “without any witness ever seeing the firearm.”¹⁵ See *Workman*, 90 Wn.2d at 448 (“[I]t is not necessary in order to prove the crime that the attendant [may] have seen [the defendants’ gun].”)

Second, under *Workman*’s first prong, the court examines the greater offense “as charged and prosecuted, rather than... [as it] broadly appear[s] in statute.” *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). In this case, multiple witnesses saw Mr. Miller display his firearm. The offense, “as charged and prosecuted,” includes “[a] display or intimidation,” which Respondent describes as “the crux” of the unlawful display charge. Brief of Respondent, p. 21.

As the trial judge concluded, unlawful display of a firearm is a lesser included offense of first-degree assault under *Workman*’s legal prong.

B. Unlawful display of a weapon is a lesser included offense of first-

¹⁵ Brief of Respondent, p. 21.

degree assault under *Workman*'s factual prong.

The trial court found that the evidence satisfied *Workman*'s factual prong. RP (10/21/19) 775-776. Respondent now claims that the facts do not satisfy *Workman*. Brief of Respondent, pp. 22-25. Respondent did not make this argument to the trial court and did not assign error to the court's finding on appeal. RP (10/19/19) 772-787; Brief of Respondent, p. 2. Furthermore, there is at least slight evidence that Mr. Miller committed only the lesser offense.

When evaluating evidence under *Workman*'s factual prong, the evidence is viewed in a light most favorable to the instruction's proponent. *Fernandez-Medina*, 141 Wn.2d at 456. The instruction must be given if "even the slightest evidence" suggests that the person may have committed only the lesser offense rather than the charged crime. *Parker*, 102 Wn.2d at 163-164.

Here, there is at least "the slightest evidence"¹⁶ that Mr. Miller committed only unlawful display of a weapon, "to the exclusion of the greater, charged offense." *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015).

First, the testimony showed that Mr. Miller came to his porch with a gun and shot three times, hoping to persuade Aitchison and Frye to

¹⁶ *Parker*, 102 Wn.2d at 163-164.

leave. RP (10/17/19) 722, 725-727; RP (10/21/19) 751-760. Under these circumstances, a reasonable jury could find that he displayed a firearm in a manner that “warrants alarm for the safety of other persons.” RCW 9A.41.270(1). Thus, the evidence was sufficient to prove the lesser offense.

Second, the record also includes the “slightest evidence”¹⁷ that Mr. Miller committed only the lesser crime to the exclusion of first-degree assault. He testified that he did not intend to inflict great bodily harm, and the jury apparently had a reasonable doubt on this element as they acquitted him of first-degree assault. RP (10/17/19) 722, 725-727; RP (10/21/19) 751-760; CP 65-67.

Respondent suggests that Mr. Miller was not entitled to instructions on unlawful display of a weapon unless he could show he committed only that crime to the exclusion of *second*-degree assault. Brief of Respondent, pp. 23. This is incorrect.

Under *Workman*'s factual prong, the evidence is measured against the *charged* crime. *State v. Gamble*, 168 Wn.2d 161, 181, 225 P.3d 973 (2010). The record must include the slightest evidence that the defendant committed only the lesser offense “to the exclusion of the *charged* offense.” *Id.* (emphasis added); *see also Condon*, 182 Wn.2d at 316.

Here, Mr. Miller was charged with first-degree assault. He was

¹⁷ *Parker*, 102 Wn.2d at 163-164.

required to meet the *Workman* test as to that charge. *See Condon*, 182 Wn.2d at 316-326. He was not required to also show that he committed unlawful display to the exclusion of all offenses contained with first-degree assault.¹⁸ *Id.*

Mr. Miller was entitled to instructions on unlawful display of a weapon because he met the factual prong as to the *charged* crime. *Id.* The trial court erred by refusing to instruct on the lesser included charge.

C. Mr. Miller was not “in” his place of abode, and thus could have been prosecuted for unlawful display of a weapon.

Although the trial court found that Mr. Miller had satisfied both prongs of *Workman*, the court refused to instruct on the lesser charge. RP (10/21/19) 775-776. The court’s refusal was based on a misunderstanding of the law. *See* Appellant’s Opening Brief, pp. 17-26.

The statute criminalizing unlawful display of a weapon exempts acts committed by a person while “in” his place of abode. RCW 9A.12.270(3)(a). Mr. Miller was not “in” his trailer – he was on the front porch, facing the street. RP (10/17/19) 722, 725-727; RP (10/21/19) 751-760.

¹⁸ Furthermore, there is at least the slightest evidence that Mr. Miller did not commit second-degree assault. Jurors could conclude that he did not intend to create “apprehension and fear of bodily injury” when he fired his gun, but rather that he intended to create fear that he *might* inflict bodily injury in the future if he fired again.

The plain meaning of the word “in” requires an interpretation that covers Mr. Miller’s situation. He was not inside his trailer; he occupied an area outside the trailer: his front porch is outside the front door; it is exposed to and open to the public. *See* Ex. 11, 17.

Mr. Miller’s case differs from *State v. Haley*, 35 Wn.App. 96, 98, 665 P.2d 1375 (1983). In *Haley*, the defendant was “in” his house because he stood on a large back porch that was a significant structure well-integrated into the house. *Haley*, 35 Wn.App. at 97; *see* Appellant’s Opening Brief, pp. 22-23.

Respondent’s position—that one is “in” a house when one stands on a small front porch near the street—permits the very hazard the statute attempts to prevent. It would allow a person to menace the public from a rooftop, a balcony, or stairs leading to a front door. Mr. Miller’s conduct would not be a violation of RCW 9.41.270.

Mr. Miller’s conduct was within the statute’s reach. Because there was at least the “slightest evidence” that Mr. Miller committed only unlawful display of a weapon, the trial court erred by refusing to instruct on that charge. *Parker*, 102 Wn.2d at 163-164. Mr. Miller’s convictions must be reversed, and the case remanded for a new trial with proper instructions. *Id.*

III. THE TRIAL JUDGE VIOLATED MR. MILLER'S DUE PROCESS RIGHT TO INSTRUCTIONS ON A LESSER-INCLUDED OFFENSE.

Mr. Miller rests on the argument set forth in his Opening Brief.

IV. THE TRIAL COURT VIOLATED MR. MILLER'S RIGHT TO COUNSEL BY FAILING TO ADEQUATELY INQUIRE INTO HIS CONFLICT WITH HIS ATTORNEY.

Mr. Miller rests on the argument set forth in his Opening Brief.

CONCLUSION

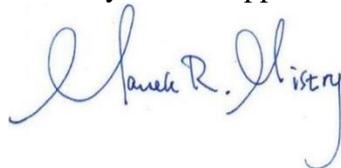
Mr. Miller's convictions must be reversed, and the case remanded for a new trial with proper instructions. He was deprived of his right to claim self-defense and his right to have the jury instructed on a lesser-included offense.¹⁹

Respectfully submitted on June 22, 2020,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

¹⁹ He was also deprived of his right to counsel, as argued in Appellant's Opening Brief.

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Michael Miller, DOC #420364
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 22, 2020.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

June 22, 2020 - 10:47 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54288-9
Appellate Court Case Title: State of Washington, Respondent v. Michael Miller, Appellant
Superior Court Case Number: 18-1-03704-4

The following documents have been uploaded:

- 542889_Briefs_20200622104620D2432853_2523.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 54288-9 State v. Michael Miller Reply Brief.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- teresa.chen@piercecountywa.gov

Comments:

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com

Address:

PO BOX 6490

OLYMPIA, WA, 98507-6490

Phone: 360-339-4870

Note: The Filing Id is 20200622104620D2432853